

## THE ESTABLISHMENT CLAUSE AND THE PROBLEM OF THE CHURCH

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It turns out— who would have guessed?— that Thomas Jefferson got it right after all: the establishment clause *was* intended and understood to erect a “wall of separation between church and state.” Less metaphorically, the clause was a response to what we can call “the problem of the church,” and it responded to that problem by (among other things that it did) denying the national government power over the church. Moreover, a recovery of that elementary truth might reorient religion clause jurisprudence in a way that could make the law not only more faithful to the clause’s original meaning but also potentially more coherent and more congruent with our political traditions and culture.

Or so I shall argue. This argument should provide no comfort, however, to those— Justice Souter, for example— who are wont to invoke the authority of Jefferson; indeed, it is the self-styled acolytes of Jefferson who as much as anyone have misunderstood, distorted, or ignored his crucial observation.

In this essay, I will try to explain how this is so. And I will discuss the relevance of what our topic asks us to take as “given”— namely, that the founders built an “implicit Protestant establishment.”

### *Religion and “the Church”*

My argument requires some initial reflection on the difference between *religion* and a *church*, and on what a church has meant to those who believe in or belong to it. (I use the indefinite article for now— *a church*— though later I will explain why I think the definite article is

in some respects more suitable.) A church is clearly a manifestation of religion but, also clearly, it is not the same thing as religion. “Religion,” though notoriously difficult to define, typically refers to a body of beliefs, practices, ways of talking, ways of living, usually with an orientation to God or some transcendent reality. A church, by contrast, is a manifestation of religion, but it is something more than that. Over the centuries the subject has stimulated a vast amount of reflection and articulation, and I will not pretend to offer any adequate definition here. But three typical features are important for my argument.

First, at the most mundane level, a church is an association or fellowship of religious believers. So it is religion in a collective or communal form. Second, a church has typically been formed and conceived as a sort of polity— a polity that typically has a formal or informal constitution of some sort sustaining a structure of offices and roles, and that claims authority to pronounce doctrines, resolve disputes, and discipline transgressing members.

These two features, however— the features of being an association of believers and of having the form of a sort of polity— do not yet express what may be the most essential feature, which is this: the members of a church typically believe that their association is in some sense divinely instituted, and indeed that it is a this-worldly manifestation of a divine reality.

Conceptions of the church have often had a sort of Platonic quality, in which the observable organization and its workings may be described as a “visible” manifestation or embodiment of what is sometimes called “the invisible church.” This third feature is more elusive or mystical than the first two. But it is what makes a “church” fundamentally different than a host of other associations— even religious associations— formed for shared purposes and having a particular structure. Thus, Christians may sometimes unite to form associations with particular organizational structures and for particular purposes— Bible study, charitable service— without

regarding such associations as “churches,” much less as “*the church*.” It is the absence of this third, more mystical feature, I suggest, that makes such organizations seem to be mere religious associations, not *the church*.

It may be— I’m not sure— that “church” is a distinctively Christian notion. Devotees of other religions often associate together, of course, for worship and other purposes. But these associations are evidently not quite equivalent to what Christians call “the church”; in particular, they may not have either the polity-like character or the more mystical or Platonic quality that I have just referred to. Or so scholars tell us, though nothing in what I will say here depends on the point.

The fact that many religions do not generate churches, and that many religious believers (including many believers in Christianity) do not affiliate with any church, demonstrates the distinction between “religion” and “church.” Indeed, many religious believers are suspicious of, or even overtly hostile to, “the church.” Conversely, the fact that at least the Christian religion *does* frequently issue in the formation of churches that have the character of specialized polities gives rise to a question— or a complicated set of questions— that has challenged believers and governments throughout Western history. What is the relation between the polity that is the church and other polities with which the church may come into contact— in particular, the state? Over the centuries, this question has generated vast amounts of theorizing, arguing, and politicking— and sometimes violent conflict. Let us call this multi-faceted question about the relation of church and state the “problem of the church.” (I hasten to add that I do not intend “problem” to be a pejorative term here, and I do not regard the church only or primarily as a “problem.”)

I will suggest that the First Amendment’s religion clauses can be viewed (with an

important qualification that I will notice) as a response by the American founders to this perennial question– to “the problem of the church.” But because the First Amendment was a relatively late chapter in the story, we need to notice some important episodes or phases of the story the preceded the American episode.

*BJM: Before Jefferson and Madison*

Two developments in particular need to be recalled. One crucial phase was the struggle during the Middle Ages for “freedom of the church.” Popes like Gregory VII and bishops like Anselm and Beckett had struggled to keep the church free from the control of emperors and kings– of rulers whom we can describe with the slippery term “secular.” Conversely, secular rulers like the emperor Henry IV and Phillip IV of France had exerted themselves to maintain influence within the church and to resist what they viewed as overreaching by the church.

We can understand this struggle as an effort to define and maintain a “separation of church and state.” It was emphatically *not* a struggle to keep a “secular” public sphere free from “religion.” Here the term “secular” is apt to mislead us. Classically, “secular” did not mean, as it often does today, “not religious”; rather it referred to this life and this world, which themselves were understood to be, as Nomi Stolzenberg puts it, “a specialized area of God’s domain.” In that sense, clergy who served in a parish– in the world– as opposed to retreating to a monastery were the “secular clergy.” In a similar sense, “secular” rulers could and did view themselves as God’s ordained servants with responsibility to do God’s will within that specialized area.

The medieval effort to demarcate the jurisdictional lines between the church and the “specialized area of God’s domain” that was entrusted to the “secular” ruler was thus essentially a theological struggle. Popes and princes agreed that within God’s overarching order the church

and the state were responsible for distinct jurisdictions, and they argued about the proper allocation of jurisdiction mainly in religious terms.

The second historical phase that is important for our purposes involved the fragmentation and subjugation of the church that followed the Catholic-Protestant split. European Christians separated into a cacophony of Catholic, Lutheran, Reformed, Anabaptist, and Anglican associations. Often, of course, these divisions were a source of social and political conflict, and secular rulers accordingly felt called upon to intervene and to declare which of the various claimants would be *the* church of the realm. Such intervention led to an arrangement sometimes described as “Erastian.” Jose Casanova explains that following the Reformation, “[t]he churches attempted to reproduce the model of Christendom at the national level, but all the territorial national churches, Anglican as well as Lutheran, Catholic as well as Orthodox, fell under caesaropapist control of the absolutist state.”<sup>1</sup>

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<sup>1</sup> Casanova, at 22.

The revolution in England by which King Henry VIII was declared to be the head of the church reflected the radical change. In the Middle Ages, secular rulers had sometimes claimed a role in the governance of the church. And they had sometimes fought with the church and pushed it around, sometimes to the point of effectively deposing popes and replacing them with other popes. But even in their most aggressively officious campaigns, in the West at least, these rulers had not treated the church as merely a subdivision of the state, and they had not declared themselves to *be* the head of the church. The Erastian subjection of the church thus reflected a radically expanded claim of authority by the state over the church: let us call this “the Erastian claim.”

Because different rulers recognized different churches as the official church of the realm, and because eventually they also allowed for the possibility of dissenting churches, it might now seem anachronistic to speak of “*the church*,” in the singular: there are now many churches. And yet the singular usage did not disappear. Christians continued, and still continue, to refer to *the church*. What does this usage imply?

More than one thing, probably.<sup>2</sup> But in part the singular usage reflects the fact that Christians have often thought of “the Church” in almost Platonic terms as a sort of mystical body— the “invisible church”— of which the “visible church” is an observable, this worldly embodiment. On this view, even when churches divide and proliferate, it is possible to think of the various *churches* as particular manifestations or local chapters of *the church*, so to speak. Consequently, even in the midst of a host of “churches,” it is still possible to talk of “the church”— and hence of “the problem of the church.”

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<sup>2</sup> For example, many Christians believed, and many still believe, that although there are various associations that can be described as “churches,” one of them in particular is still “the *true church*”; the others are, we might say, imitators or pretenders.

Skipping over some important developments (in particular the development by which “conscience” came in some Protestant thought to serve the function of “the church,” so that the commitment to “freedom of the church” was expanded into a commitment to “freedom of conscience”), we can fast forward to the American founding. Like the secular rulers who preceded them, the founders were faced with the problem of the church. How did they respond to that problem?

The short answer, I will suggest, is that at least with respect to the national government they renounced the Erastian claim, thereby disclaiming power over the church. The First Amendment’s establishment clause was an official expression of this disclaimer. Before explaining why this interpretation seems persuasive, however, I need to notice a major complication.

### *Jurisdiction and Substance*

I have argued at length elsewhere that the First Amendment religion clauses were understood by their enactors to be a purely jurisdictional measure. The reason the establishment clause generated so little discussion in Congress and the ratifying states, I think, is that it was intended and understood to be nothing more than written confirmation of the already existing arrangement whereby jurisdiction over questions involving the establishment of religion were for the states, not the national government, to deal with. Thus, the establishment clause was about the allocation of *jurisdiction*—jurisdiction not, as in the classical context, between the spiritual and temporal authorities, but rather between the state and national governments. The clause did not constitutionalize any particular *substantive principle* of nonestablishment or religious freedom.

That jurisdictional arrangement has long since been repudiated, however, and there is no realistic possibility, I think, that it could be restored. Ironically, modern decisions like *Everson v. Board of Education* that purported to “incorporate” and extend the establishment clause in effect repudiated it, at least in its original meaning. The original understanding was that the federal government would leave matters of the establishment of religion to the states; “incorporation,” conversely, meant that the federal government, or at least the federal courts, would *not* leave such matters to the states, but would instead exercise an active, intrusive supervisory role over both the federal and state governments in the area of religion. But even if we can identify this historical blunder, it does not follow that we can or would want to undo it. In my view, “incorporation” is too long and deeply entrenched, and the structure and functions of government in this country have changed too much, to permit any return to the jurisdictional arrangement contemplated by the founders.

A conclusion that one might plausibly draw from these reflections— and that I have in the past been inclined to draw— is that “original meaning” is simply irrelevant to modern establishment clause jurisprudence. Partly in response to the assigned topic, however, this essay attempts to see whether something of relevance can be salvaged from the original meaning. And so it seems fair to observe that even if the establishment clause was intended to be merely a denial of jurisdiction, it was still a denial of jurisdiction over *something*— something that the enactors denominated with the term “establishment of religion.” In trying to ascertain the original meaning, we still have to ask what that disavowal of authority or jurisdiction referred to. My suggestion is that it referred to power over “the church.”

On this interpretation, we would not be able say that the establishment clause represented a decision embracing nonestablishment, or “separation of church and state,” as the *true*

*substantive principle.* Individual enactors surely differed in their views, but as a body they remained collectively noncommittal about religious establishments at the state level; indeed, the establishment clause worked to protect such establishments level against national interference. Even if its motivation and substance were jurisdictional, however, the clause did deny the national government power over the church. And that denial might in principle serve as a basis for an originalist jurisprudence.

More specifically, despite the clause's jurisdictional purpose, we will still be telling the truth— or at least we may be, if the evidence is supportive— in saying that the establishment clause expressed a disavowal at the national level of the Erastian claim to power over the church. And that proposition conceivably might provide us with the raw material for constructing a jurisprudence faithful to at least this aspect of the enactors' understanding.

#### *The Establishment Clause's Core Meaning: No Power Over the Church*

But *is* the evidence supportive? The interpretation I propose can be presented in two steps. The first step is well supported by the historical evidence, I think, but the second step involves more complexities.

The first step is to observe that the enactors of the establishment clause surely understood it to mean at least that the national government could not set up any official or preferred church. Thus, during discussions in the House of Representatives regarding what became the establishment clause, Madison observed that “the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.” The provision was designed to prevent such an occurrence. The Senate approved a measure that provided that “Congress shall not make any law . . . establishing any religious *sect*

*or society,*” but ultimately revised the provision to read that “Congress shall make no law establishing *articles of faith* or a *mode of worship* . . . .”

“Sect,” “society,” “articles of faith,” “modes of worship”: these terms seem to refer not just to religion in some generic sense but to the sort of religion that is associated with and embodied in churches. Such expressions indicate, I think, that the establishment clause was a response to “the problem of the church” and that it at least disclaimed the Erastian power to set up an official church. But what about other imaginable kinds of involvement with or interferences in churches that would not amount to designating some particular church as *the* preferred or official church? What if, rather than singling out any church for special favor, Congress had *banned* the formation of churches (in the territories or the District of Columbia, perhaps, where Congress had governing authority)? Or what if, in response to a concern about underliterate clergy, Congress had imposed an across-the-board, denomination-neutral regulation on all churches requiring that ministers of the Gospel must meet certain specified standards of education? Such measures would not single out any particular religion or church for official preference. So, is there evidence that the enactors of the establishment clause contemplated that it would forbid such actions?

The question points us to the second step in my argument, which observes that the establishment clause was understood not simply as a specific constraint curbing a power that Congress possessed. Rather, it was a disclaimer of power— of a power that proponents of the measure had insisted that Congress did not have in any case, and that (if Congress *had* possessed it) might have been exercised to establish a national church.

So, what exactly was that power which the establishment clause disclaimed? On this point, the historical record is less straightforward. But we might start with the narrowest

possible answer. The clause might have disclaimed the power to set up a national church, and nothing more. (Or perhaps power to set up a national church or to interfere in state religious establishments.) By this answer, the establishment clause would not have prevented the national government from adopting the sorts of intrusive measures mentioned above.

But this exceedingly narrow answer seems unpersuasive. For one thing, the enactors often spoke as if the power denied the national government was broader than this. Indeed, they sometimes went so far as to suggest that the national government had been denied all power with respect to “religion” generally. Thus, in a draft that was temporarily adopted in the House of Representatives, for example, Samuel Livermore proposed that Congress would have no power to make laws “touching religion.”

It is hard to take such statements at full face value. For one thing, to purport to deny Congress all power to do things even “touching religion” would be to attempt something impossible. Suppose Congress instituted a military draft, for example; whether the draft exempted religious pacifists such as Quakers or did not exempt them, it would be “touching” religion. Though the record is silent regarding the exact reasons for the change, therefore, it is plausible to suppose that after initially approving Livermore’s expansive no “touching religion” language, the congressional representatives reflected and realized that this formulation was well intended but untenable. In addition, the actions of early Congresses— we will notice some instances shortly— is starkly inconsistent with the suggestion that members of Congress believed they had disclaimed *all* power to act in matters of “religion.”

If the “no power over religion, period” formulation is too broad, however, the evidence that might initially seem to support that formulation at least suggests that the enactors thought they were disavowing a power that was somewhat wider than simply the power to set up a

national church. So what sort of intermediate power might the clause have disclaimed? I don't believe the historical record explicitly answers this question. But especially if the clause is seen as a response to longstanding "problem of the church," it seems plausible to say that the clause essentially disclaimed power over "the church." Moreover, as we will see, this answer seems consistent with actions taken by early Congresses and Presidents.

In addition, if we accept that the various churches understood themselves to be embodiments of *the church*, and that it was by virtue of that understanding that they regarded themselves as "churches," then we can see as well why even an across-the-board regulation of churches could be understood as a claim of power over *the church*. If the various churches are understood, in other words, as local chapters or franchises of "the church," so to speak, then any state regulation of any or all of them would be an intrusion by the state into the domain of the church. In this sense, the government would be exercising the same power-- the Erastian power of the state over the church-- whether it acted to set up a single official national church or to regulate churches in general-- churches *qua* churches-- by, for example, an across-the-board imposition of requirements for ministry. And the purpose of the establishment clause, on the interpretation I'm offering, was precisely to disclaim *that power*, not merely to forbid one possible use of that power.

If this is what the establishment clause did, it is important to note as well what the clause did *not* do. More specifically, it did not address or attempt to regulate the relation between the national government and *religion* as such or in general. The clause was concerned with the relation between the national government and *churches*. Or, more accurately, between the national government and *the church*.

*More Evidence: Jefferson and his Generation*

One attraction of this interpretation of the establishment clause as concerned with churches is that it helps account for actions and statements from the founding period that have often been thought awkward or embarrassing— or downright hypocritical. For example, at about the same time that they were approving what became the establishment clause, both houses of Congress appointed chaplains to begin legislative sessions with prayer. And Congress authorized the President to proclaim a national day of prayer and thanksgiving; President Washington exercised this authority, not reluctantly, but with evident enthusiasm.

On modern interpretations which have seen the establishment clause as separating government from *religion*, these actions have seemed suspect at best. But although decades later Madison expressed doubts, at the time there seems to have been no sense that the government was acting contrary to principles it was simultaneously drafting and enacting. On the interpretation I am offering here, that attitude seems perfectly appropriate. The establishment clause was about keeping the national government from exercising power over *churches*. Legislative prayer and a national day of thanksgiving are clearly *religious* expressions or gestures, but these actions do not seem to entail any sort of interference with *churches*.

Jefferson, as is often noted, had a different view, and he accordingly refused to follow the examples of Washington and Adams in designating days of thanksgiving and prayer. Modern proponents of secular government have often adopted Jefferson as their champion, while those opposed to this sort of “strict separation” have typically argued that Jefferson was an outlier whose views on government and religion were far outside the mainstream of American thought. On the interpretation offered here, by contrast, the differences between Jefferson’s admittedly somewhat idiosyncratic views and those of his contemporaries can be understood as a relatively

minor intramural dispute.

Consider, for example, Jefferson's views on government-sponsored prayers or religious statements. Among many others, Justice Souter cites Jefferson's refusal to recommend national days of fasting and prayer as proof that "Jefferson necessarily . . . construed the Establishment Clause to forbid not simply state coercion, but also state endorsement, of religious belief and observance." But other actions and statements seem to contradict Souter's assertion. Consider Jefferson's Second Inaugural Address (in which, I perhaps need to point out, Jefferson presumably was speaking and was understood to be speaking *as President*, not as a private citizen): "I shall need," Jefferson told the nation,

the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life, who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me . . .<sup>3</sup>

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<sup>3</sup> Reprinted in Noonan & Gaffney, at 206.

That statement certainly sounds like an endorsement of a religious faith. Indeed it seems to be imploring the citizenry to join the President in prayer– to be doing, in other words, just what Justice Souter says Jefferson was *opposed* in principle to doing. And of course Jefferson’s celebrated Virginia Statute for Religious Freedom began with the eloquent declaration that “Almighty God hath created the mind free,” and that governmental coercion in matters of religion represented “a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do.”<sup>4</sup> Can you read those words and not perceive an endorsement of religious belief?

So, was Jefferson simply being inconsistent, or hypocritical– objecting to governmentally-sponsored prayer or religious statements but then employing and advocating such practices when it suited his purpose? Maybe. But on the interpretation offered here, it seems there is no necessary inconsistency.

Return for a moment to the issue of national days of prayer. In citing Jefferson’s refusal, Justice Souter quotes from an explanatory letter Jefferson wrote to the Reverend Samuel Miller. But Souter omits to quote the core of Jefferson’s explanation, in which the President asserted that “[f]asting and prayer are religious exercises. . . . Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets . . . .”

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<sup>4</sup> Virginia Act for Religious Freedom, reprinted in *Church and State in the Modern Age: A Documentary History* 63-64 (J. F. McClear ed. 1995).

These sentences, it seems to me, allude to the history of Christianity in which different believers and sects have disagreed, sometimes passionately, about what holy days should be observed and what dates should be designated for these observances. Thus, the proper date for celebrating Easter was a source of serious contention in early English Christianity and again in controversies between Western and Eastern Christianity. Protestants of course objected to many of the holy days accepted in Catholic Christianity, and Puritans and others have opposed the celebration of Christmas. Although his view may have been idiosyncratic, Jefferson seems to have understood proposals for a national day of prayer as an invitation to involve the national government in these sorts of internal theological and ecclesiastical disputes— disputes to be resolved within churches— and he accordingly declined the invitation. At the same time, he seems to have had no general objection to expressing religious views-- even in his official capacity as President, and even in the form of a statute. These expressions, evidently, did not appear to him to be intruding into the domain of the churches.

More generally, Jefferson's famous metaphor of the "wall of separation between church and state" comes to seem entirely apt as a description of what the establishment clause was about. Typically, modern "separationists" have trumpeted Jefferson's statement while opponents have responded by stressing that Jefferson held idiosyncratic views and that his metaphor did not reflect the views of most of his contemporaries. On the interpretation I offer here, by contrast, the metaphor seems apt enough— so long, that is, as we notice (as modern separationists usually do not) that the separation Jefferson proclaimed was between "*church* and state," not between *religion* and government.

*How Modern Interpreters Overlooked the Original Meaning*

The interpretation I have been offering here seems commonsensical enough, and it seems to fit both what early Americans said and what they did. Why then has this interpretation been largely overlooked in modern American jurisprudence?

I have reached the interpretation I offer here by viewing the establishment clause against the backdrop of the longstanding struggle and debate about what I have called “the problem of the church”—the problem, that is, of allocating jurisdiction between the polity that was “the church” and the polity we call “the state.” But for a variety of reasons (including, ironically, the very success of the establishment clause and related measures at the state level), that problem has largely receded from view for modern judges and scholars. Indeed, the idea of “the church” as a *polity with jurisdiction* independent of the state’s jurisdiction is one that probably would never even occur to most modern interpreters. Instead, they have typically viewed the establishment clause from within a more secular worldview shaped by recurrent predictions that as the world becomes more enlightened it must inevitably become more secular—secular not in the classical sense but in the more modern sense of “not religious”—and also by prescriptions of secular government as the necessary and proper response to pluralism or the necessary condition or entailment of liberal democracy.

Within the modern secular worldview, the classical jurisdictional problem of church and state has become almost invisible. So modern interpreters have missed the connection between the establishment clause and the “problem of the church.” Conversely, it has seemed natural to view the establishment clause as a response to the prescription and the anticipated development of secularism or secular government.

In this new hermeneutical framework, the establishment clause comes to be viewed as a provision regulating the relation between government and *religion*-- with churches simply being

one concrete manifestation of that social phenomenon. And if the clause was meant to separate government from religion, then it has seemed inexorably to follow that the provision constitutes a requirement that government remain “secular”– meaning, now, *not religious*. So government is limited to acting for purposes that are not “religious” (whatever that means) and is forbidden to support “religion,” or to endorse “religion,” or to act on the basis of religious grounds or judgments. The overwhelming evidence that the founding generation did not understand the clause to mean any such thing is dismissed, typically with the comment that the framers evidently failed to think through the implications of what they had done. Or perhaps they were merely being hypocritical or opportunistic, as politicians are wont to be.<sup>5</sup> Meanwhile, the original meaning of the clause– a meaning that makes perfect sense in terms of the classical question that was live for the founders but is largely moribund for us– is forgotten or overlooked.

### *Implications for Contemporary Jurisprudence*

Thus far I have been arguing that the founders understood the establishment clause as a response to the problem of the church and as a disclaimer of the Erastian power over the church, and I have suggested a possible reason for the failure of modern interpreters to appreciate this meaning. But now we come to the practical question: what difference would it make if the courts today came to embrace the original meaning? What sort of jurisprudence might flow out of that meaning?

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<sup>5</sup> [souter in lee, laycock]

First let me acknowledge what you may view as the disappointing modesty of my interpretation. My argument is primarily a claim about *what the question was*— in other words, about what problem or issue or subject matter the establishment clause was addressing. It is not an argument that can supply definite answers to that question. Nor do I think that there are any simple answers to that question, or answers that can be easily deduced simply from the original meaning. It is tempting to say what Justice Black liked to say about the free speech clause— that “no law” means “no law.” Government should simply leave churches alone, period. That answer is not realistically available, though, for essentially the same reason it is not helpfully available for free speech: it demands what is impossible. Churches and governments do not occupy separate geographical spaces or concern themselves with wholly different human issues, such that they could simply have nothing to do with each other. If they were in fact so separated as a factual matter, the legal and normative conflicts we consider under this heading would presumably not arise in the first place.

In fact, church and state occupy overlapping space, deal with overlapping concerns, and claim the allegiance of many of the same people. They will, inevitably, interact with each other in complex ways. Some of those interactions will seem perfectly acceptable to nearly everyone (e.g., the fire department putting out fires in the church house), and others will seem unacceptable to most of us (legislative approval or disapproval of a church’s basic creed). But in between these extremes there will be many contestable issues-- over clergy abuse, property disputes, and so forth— to which the interpretation I offer here does not supply ready-made answers.

Even so, it is often a large step forward to figure out what the right question is. Though it does not automatically generate answers to all questions, an interpretation understanding the

establishment clause as a response to the problem of the church would reorient constitutional jurisprudence in two major and, I think, beneficial ways. First, it would operate to relieve constitutional courts of tasks that they have imprudently undertaken and that have proven troublesome and embarrassing. Second, it would refocus their attention on the central question that they have largely overlooked.

Thus, under the interpretation proposed here, whole areas of problematic modern doctrine and case law could be lopped off. For example, all of the tortured jurisprudence under the “no endorsement” doctrine— a doctrine that forces judges to pretend to explain through clenched teeth and to the satisfaction of no one that the national motto (“In God We Trust”) and the words “under God” in the Pledge of Allegiance do not send any religious message— could be summarily dispensed with. Religious expressions by government may or may not be prudent— some are, probably, and some aren’t— but either way, this is simply not the sort of issue that the establishment clause was addressing, as the actions of early leaders (*including* Jefferson, Justice Souter notwithstanding) overwhelmingly attest. Similarly, the question of school prayer could be reassigned to the domain of the free exercise clause, where it belongs. School prayers may or may not be good practice, and they may or may not be coercive, but they do not amount to either setting up or meddling in a church.

Conversely, a reoriented jurisprudence would underscore that the establishment clause *is* centrally intended to prevent government from exercising power over the church.<sup>6</sup> This

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<sup>6</sup> In this respect, this interpretation would emphasize that what the establishment sought to prevent was the sort of interaction in which the government involves itself in the business of churches *qua the church*, so to speak— in those doctrines and structural features in which churches claim to be manifesting or embodying *the church*. Churches make a variety of decisions and do a variety of things, and in only some of these matters do they understand themselves to be acting as *the church*, so to speak. In its articulation of basic doctrine or its

recognition might provide a more satisfactory way of accounting for decisions that current doctrine leaves in an embarrassing state. Take the so-called “ministerial exception” whereby churches are permitted to determine their own criteria for selecting and ordaining clergy, even in the face of employment discrimination laws that appear to dictate otherwise. Rick Garnett poses the question clearly: “If . . . it would be illegal for Wal-Mart to fire a store-manager because of her gender, then why should a religiously affiliated university be permitted to fire a chaplain because of hers?”<sup>7</sup>

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elaboration of its priestly hierarchy, a church is likely to consider itself as manifesting the divine model, participation in which underlines its claim to the title of “the church.” It has no discretion to depart from these fundamentals; to do so would be to compromise its status as “the church.” In sponsoring social or social service or political activities, by contrast, a church is very likely acting to carry out its religious beliefs and commitments, but it may not regard these affairs as being as *constitutive* of its character as *the church*. Consequently, state regulation of these activities might not be as obviously an exercise of the Erastian authority that the establishment clause disclaimed.

<sup>7</sup> Richard Garnett, Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?, 22 St. John’s J. Legal Comm. 515, 521 (2007).

Under existing religion clause doctrine, the constitutional exemption of churches from employment discrimination law is hard to explain. Employment discrimination laws would seem to be “generally applicable” and “neutral” toward religion: they do not target or discriminate against religious employers. So they would seem to be valid under current free exercise doctrine. And such laws surely serve a secular purpose and have a predominantly secular effect. Arguably their application to churches would “entangle” government with religion, but the “no excessive entanglement” requirement is so amorphous that it provides a frail basis for constitutional conclusions.

What the “no entanglement” requirement does do, I would suggest, is point us to the concern to keep government out of the business of intervening in the affairs of churches *qua* “the church.” That concern was, I have argued, the original purpose of the establishment clause, and it would provide a more promising basis than existing doctrine affords to explain the “ministerial exception.”

More generally, a constitutional jurisprudence oriented to keeping government separate from institutional religion would help to dissolve the debilitating conflict between a constitutional doctrine that ostensibly requires government to be secular and an ongoing political tradition in which government pervasively expresses and relies on religious convictions held by citizens and officials. That opposition, I would suggest, is the source of much of the incoherent and seemingly disingenuous quality of modern establishment clause jurisprudence. The elimination of that source of tension would present at least a possibility of a jurisprudence in which judges could decide cases without so regularly resulting to pretense, fiction, and problematic or spurious distinctions.

*An “Implicit Protestant Establishment”?*

Our topic asks us to consider the possibilities for an originalist jurisprudence under the constraint of a stipulation— namely, that the founders believed in and in fact built an “implicit Protestant establishment.” I confess to being somewhat uncertain about just what this stipulation means, about whether it is historically correct, and about what bearing it has on the main question of an originalist jurisprudence. My sense is that the stipulation is supposed to raise an obstacle: the suggestion seems to be that a condition of the original clauses— namely, the existence of “an implicit Protestant establishment”— no longer obtains, and that this change complicates the project of formulating a viable originalist jurisprudence for our time.

My own reaction to the stipulation is different, and more welcoming, albeit with reservations. I take the claim about an implicit Protestant establishment to mean something like this: At the founding, most Americans (though certainly not all) were Protestants of one kind or another. Protestant churches were active in political and civic life, and Protestant thinking dominated American political culture, either affirmatively or as something that some Americans (such as the so-called “deists”) were reacting against. Protestant thought influenced the laws and constitutions of the new nation in all sorts of ways. And government figures unapologetically expressed beliefs grounded in or growing out of Protestantism in various ways, as in the official prayers and thanksgiving proclamations that we have already noticed.

I admit to having some qualms about describing this state of affairs as an “implicit Protestant establishment.” All three terms seem problematic. The cultural and political influences I have mentioned were not especially “implicit”; they were often quite overt. Though Protestantism figured prominently in the political culture, it was surely not the only ingredient: various other modes of thought— Enlightenment rationalism, for example, or civic

republicanism– were important as well. Perhaps most importantly, on my interpretation of what the term “establishment of religion” referred to, much of what I have acknowledged in founding era culture, although religious, would not accurately be characterized as an “*establishment of religion.*”

More generally, I am afraid the description of founding era cultural and political realities as an “implicit establishment” reflects and contributes to the kind of error I have attributed to modern interpreters for whom “secularism”– not “the problem of the church”– is the key issue. The “implicit establishment” description resonates with a familiar view that sometimes connotes a deep inconsistency or hypocrisy in the founders’ treatment of religion. Religion was formally disestablished, in this view, but in reality and in practice it continued to be “implicitly” established. Hence, a second disestablishment, and perhaps a third (and a fourth?), were required in order to realize the framers’ ostensible ideal of a secular government.

As I have already suggested, I believe this view distorts the founding era decision and puts modern jurisprudence at odds with the American political tradition. In addition, it reflects a regrettable lapse in the understanding of ours or probably any other political situation. As the framers well understood, behind the institutions and decisions of government there will always be a body of fundamental beliefs about human nature, government and its role, justice and, ultimately, the nature and meaning of the cosmos. Political institutions and decisions both large and small will be grounded in this body of beliefs and values. In a community in which many citizens are religious, those fundamental beliefs will naturally be religious to a significant extent. The framers did not engage in any misguided attempt to sever government or politics from those fundamental beliefs; rather, on the basis of such beliefs they constructed the best government they could.

They understood, of course, that beliefs differ, and that what people believe will typically be in a condition of conflict, and of flux. And far from attempting to freeze in place any particular orthodoxy, they provided for that condition of diversity and flux in, for example, the religion clauses and the free speech clause, but more generally in the overall character of democratic government that they provided for. What they most emphatically did *not* do, however, is what so many modern jurists and political philosophers have tried to do— that is, to cut off the structure and processes of politics and government from the people’s deepest beliefs about what is just, good, and true.

Despite my reservations about its wording, therefore, I see the substance of the claim about an “implicit Protestant establishment” not as an obstacle to a viable originalist jurisprudence for today, but rather as an acknowledgment that should accompany any sensible and sound jurisprudence. There will be today, as there will always be, a body of basic beliefs and values that will be in the background of politics and government. In this country, now as at the founding, Protestant and, more generally, Christian beliefs and values will be one important ingredient— though hardly the only one— in that background. Those beliefs may in fact provide the soundest basis for our inherited commitments to separation of church and state and much else besides (such as our commitments to freedom of conscience, and to human rights and human equality). And a sound originalist jurisprudence— or for that matter a sound jurisprudence of any kind— would begin by recognizing rather than resenting or trying to deny that fact. Thus, recovering the original focus of the establishment clause on “the problem of *the church*” would be a welcome move away from the misguided modern attempt to use that clause as a wedge to sever politics and government from what “We the People” actually believe.

